

(Nov. 18. 1742.)

A N S W E R S

F O R

The Corporation of Barbers of *Edinburgh*, Pursuers ;

T O

The Petition of *John Wilson* and *Gilbert Blair* Barbers in the *Canongate*,
Defenders.

THE Petitioners, with no small Assurance, boldly assert,
“ That the Respondents are no Corporation ; That
“ it is only the Surgeons of *Edinburgh* that are the
“ incorporated Body ; That therefore this Complaint
“ could only have been at their Instance, and not at the In-
“ stance of the Barbers, who are only dependent upon them : ”
According to the Petitioners shewing.



Wherefore it is necessary to examine a little into the Titles of the Barbers of *Edinburgh*, as to their Right of Incorporation : And indeed this is founded in the original Seal of Cause *Anno* 1505, which is expressly in favours of the SURGEONS and BARBERS ; the whole Privileges are granted in common to these CRAFTS or TRADES in the plural Number, with this only Exception, *That no Barber, Master or Servant, use or exercise the Craft of Surgery, without he be expert, and know perfectly the Things that belong to Surgery.* Consequently the Barbers were entitled to exercise the Barber Trade without any such Knowledge : And truly, by this Seal of Cause, the Surgeon and Barber Crafts were united into one Incorporation, in
A the

the same Manner as the Masons and Wrights, and diverse other Trades, are in this and every other Burgh.

Notwithstanding that the Barbers were by this Seal of Cause on an equal Footing with the Surgeons as to all the Privileges of their own Trade, yet the Surgeons thought fit in a Manner to exclude them entirely: For by their Act dated 4th *August* 1648, mentioned produced 13th Page of the Decreet in favours of the Barbers after-mentioned, *They statute and ordain, That in no Time thereafter any Barber should be admitted except he should be tried and sufficiently qualified in Chirurgery.*

By this means the Barber Craft was in effect extinguished; for none could thenceforth be admitted thereto, in order to exercise it, unless he were likewise a Surgeon. And therefore it was no wonder, that in the 1682, when all or most of the Barbers that were Members of the Incorporation in the 1648 may be supposed to have been dead, there was such Scarcity of Barbers that the Lieges could not be served: This gave Occasion to the Council of *Edinburgh*, by their Act of that Date, *to recommend to the Deacon and Incorporation of Surgeons to take some effectual Course, that the City may be furnished with a competent Number of Persons skilled in cutting of Hair and taking off Beards, upon Payment of such Composition as the said Incorporation and these Persons should agree; And that these Persons should be holden as depending on the said Incorporation.*

The Barbers that were admitted on the Footing of this Act could not indeed be deemed Members of the Incorporation; and the Surgeons to make sure Work of it (as they thought) obtained a Gift from King *William*, which was ratified in Parliament in the 1695, in favours of themselves and the Apothecaries in *Edinburgh*, whom they substitute in place of the Barbers. This Gift and Ratification is insert on the 15th Page of the foresaid Decreet, which entirely excluded the Barbers from the Privileges of the Corporation. And, had Matters continued in this Shape, the Petitioners Argument might have had some Foundation.

But

But, in the Year 1719, the Barbers, being possess'd with a Spirit of Liberty, made a Push for rescuing themselves from the slavish Dependence under which the Surgeons had brought them; and, for that Purpose, did intend before your Lordships, the Guardians of the Liberties of the Subjects, a Declarator of their Rights and Privileges against the Surgeons, and obtained a Decreet in the 1722, ascertaining the same.

By this Decreet, Pages 16. & 17. your Lordships found, *That the Barbers shall in all Time coming have Power by themselves to chuse annually a Master of their own Craft to preceed at all their Meetings, and a Box-master for receiving the Money that arises from their own Society: That they may chuse their own Officers: That all Barbers to be admitted thereafter, either in Town or Suburbs, shall undergo an Examination and Trial before the Barbers themselves, and shall pay to them their Upsets; and that the Barbers of Edinburgh shall have the free Administration of the same, and of all their quarterly Accounts or Payments.*

And, which comes precisely to the present Point, your Lordships declare, *That the Barbers by themselves, on their own Expence, may prosecute all Incroachers upon their Employment in Town and Suburbs.* Page 17th at the End.

In Pursuance of this Declarator, the Barbers chose their own Preses and other Officers, and applied to the Town-council for ascertaining their Privileges, and obtained their Act accordingly, dated 30th May 1722. And tho', by the Decreet produced in favours of the Barbers, it appears that the Surgeons litigiously disputed the Point of Right with them; yet they were so sensible that this Act was form'd on the Plan of your Lordships Decreet, that their Deacon, sitting in Council, heartily concurr'd therein, and is one of the Committee to whom the Council referr'd the Petition for, and who subscribed the Report in favours of, the Barbers. And by this Act, Page 7th, it is declared, "That every Barber to be
" admitted thereafter, in *Canongate, Leith, Portsburgh, Pot-*

“ *teraw, Bristow, Pleasants*, and other Suburbs of *Edinburgh*,
 “ shall make Application to the Society of Barbers of *Edin-*
 “ *burgh*, and be tried and examined by them, and pay an Upset
 “ of 50 *L. Scots.*”

Accordingly, ever since the foresaid Decreet and Act, all that set up in any of the above Places are tried and examined by the Barbers of *Edinburgh*, and receive their Acts of Admission from them: And the Petitioners in particular have no other Right to exerce the Barber Craft in the *Canongate*, than on their Acts of Admission from the Respondents. So that for them to controvert the Privilege of the Barbers of *Edinburgh* over the *Canongate*, or their Right as a Society or Corporation, is to cut the Branch on which alone they themselves stand: And 'tis surprising how it could enter their Thoughts to call in question the same.

The Respondents presume, this Recital is sufficient to answer the first Objection moved in the Petition, and laboured at great Length, *viz. That the Barbers of Edinburgh are no Corporation, and have no Power to prosecute a Complaint at their Instance.* Your Lordships have expressly declared the contrary; and your Decreet, with the subsequent Act of Council, is a Restoration of them to their ancient Privileges: And it is upon that Foot they now stand, not upon the Act of Council 1682 (as the Petitioners idly suggest) which with the preceeding Act 1648, and the subsequent Gift and Ratification, were so many Incroachments and Violations of the ancient Rights of the Barbers, and intended for a total Abolition of them; against which your Lordships justly restored them, and took effectual Course to prevent the like Violations in Time coming, by allowing them a separate Management as a Society or Corporation.

And indeed, at present, the Barbers of *Edinburgh* cannot be otherwise said to be united to the Surgeons, than that they are represented in the Town-council by the Deacon of the Surgeons; which is the only Preeminence the Surgeons have above them.

But

But that does not hinder them from being a Corporation in the most proper Sense, since they have a Preses and Box-master, a Stock of their own, admit Members to their own Society, and by themselves have a Right to prosecute Incroachments on their Privileges. Their Preses does not indeed sit in Council with the other Deacons of Crafts; but what is that to the Purpose, as to their being a political Body or not? In many Royal Burghs, as *Burntisland, Kirkcudbright*, Deacons of Crafts don't sit in Council *as such*; Must the Trades in those Places be deemed, for that Reason, no Corporations?

The second Ground of the Petition is, *That the Petitioners claim to be free as to bygone Offences, from the alledged general, constant and avowed Practice of the Barbers of Edinburgh, using their Trade in the Canongate, and the Barbers of the Canongate practising within the City; That the Canongate is a Regality, and that therefore the Barbers of Edinburgh have no more Privilege to practise there, than the Barbers of the Canongate have to practise in the City: And, if they have any such, they ought to declare it as accords.*

For Answer, There is no doubt but the Barbers of the City have a Privilege to practise in the *Canongate*, and other Places above-mentioned; for, otherwise, they could not grant Licences or Acts of Admission to others to practise there. So that here again the Petitioners would cut the Branch whereon they stand: They were ordained to produce their Acts of Admission, which were limited to the *Canongate*; but did not do it, being conscious that such was the Tenor of their Grants.

And as to an avowed Custom of the Barbers of the *Canongate* practising in the City, it is absolutely denied. That they might sometimes in a clandestine Manner practise the Barber Craft in *Edinburgh*, is possible enough: But the Respondents constant Method for discovering Incroachers upon their Privileges is this; At their Quarterly Meetings, Informations are given of Incroachers; and upon getting a List of them, and previously enquiring into the Certainty of the Fact, Orders are given for prosecuting them. And it was in pursuance of this Method

Method that a Complaint was exhibited against the Petitioners, who had frequently transgressed; and a Check ought to be put to such Practice, being a plain Incroachment on the Privileges of the Barbers of *Edinburgh*. As to the avowed Practice of others, the Respondents know nothing of it; they convened all whom they suspected, who were to the Number of Five: And truly the Three others beside the Petitioners were not so much as Barbers in the *Canongate*, and acquiesced in the Judgment of the Dean of Gild Court.

And indeed the Respondents can see no Difference betwixt the Petitioners and the other three, in the present Question: For their being Barbers in the *Canongate* cannot entitle them to practise in the City; for confessedly the Barbers of *Edinburgh* have an exclusive Privilege in that Respect.

If the Petitioners think themselves well founded in their Allegance, *That the Barbers of Edinburgh have no Title to practise in the Canongate*, they may insist in a Declarator to that effect if they please; but it will come with a very bad Grace from them, who, by their Acts of Admission, have their sole Privilege of exercising their Trade in the *Canongate* from the Society of the Barbers of *Edinburgh*, and not exclusive of themselves.

And however, in the present View, it is ridiculous to pretend, "That, in order to found this Complaint, the Barbers of *Edinburgh* should prosecute a Declarator of their Right." They have already obtained your Lordships Declarator, as above, in the strongest Terms; it cannot be controverted by the Petitioners themselves that the Barbers of *Edinburgh* have the sole exclusive Privilege within the City. And,

To shew that the Barbers of *Canongate* themselves are sensible that the Respondents have an unquestionable Right to practise in the *Canongate*, they have never presumed to quarrel their doing so, tho' some of the Respondents have done it, and presently do it, by residing there, and putting out their Basons in the most publick Manner; whereas the Barbers of *Canongate*, conscious that by their Acts of Admission limiting them to the
Suburbs,

Suburbs, (which, like a bounding Charter, can never be extended beyond its March) have never dared to reside in *Edinburgh*, or put out Basons there. But since the present Question is only, Whether the Barbers of *Canongate* have a Right to exerce their Trade in *Edinburgh*? 'tis unnecessary to insist upon the Privileges of the Respondents with respect to their practising in *Canongate*.

The third Point in the Petition is, *That a Complaint of this kind could not be competent for recovering Penalties: That the Acts against unfree Traders only impose Confiscation of the Goods if they are deprehended, and that the like holds as to the Runners of Goods: That therefore, unless the Petitioners had been seized with the Utensils of Shaving, they could not thereafter have been prosecuted for an Incroachment: That there is neither Act of Parliament nor of Town-council imposing a Penalty in this Case.*

The Respondents, for Answer, shall begin with this last Circumstance: It is provided by the foresaid Act of the Town-council 1722, Page 5. *That no Freeman shall protect in his Trade or Employment an Unfreeman, under the Penalty of Forty Pounds Scots for each Transgression.* And this Penalty was libelled for in the Complaint, and it by no means appears to have been inept: The Protector of an Unfreeman is only an Accessory; and to be sure, if he is subject to such Penalty, the Unfreeman himself, the principal Offender, must much more be liable to it.

And, were there no such Act of Council, the Nature of the Thing shows that every Offence must be subject to a Penalty or Punishment; And, to be sure, the Incroachment on the Privileges of Freemen is a Transgression or Delinquency that ought to be restrained, and therefore it would of Course have been punishable arbitrarily by a Fine.

Nor can the Examples appealed to aid the Petitioners. The Goods of unfree Traders in Merchandising are declared confiscable to the Burgh Deprehender: But will it thence follow, that

that every Unfreeman in all other Employments may with Impunity incroach upon the Freedoms and Privileges of incorporated Societies? It does not appear certain but a Prosecution at the Instance of the Agent for the Burrows would be sustained against unfree Traders, for restraining them by proper Punishments from Incroachments on the Liberties of the Royal Burrows; and likewise that Runners of Goods might be subjected to condign Punishment, even tho' they should not be apprehended in the Act of Running.

But, whether such would be the Case or not, it does not meet the present: The Case of unfree Merchandising or Running of Goods cannot be drawn into Example, as to Business of a quite different Kind, especially where the Nature of the Thing repudiates such Expedient. Barbers may practise their Business of Shaving and Dressing without bringing with them any Utensils or Materials at all, with which they may be furnished by the Customers; And, in such Case, what can be seized? And, however, their Utensils are of such Kind that they can easily be concealed about them; so that, to limit the Punishment of such Transgression to a Seizure of the Utensils, were in Effect to indemnify the same.

To which it may be added, that, as these Operations are within Doors, 'tis impracticable for the Respondents to seize even these Implements: And the same Difficulty occurs to the Surgeons prosecuting Unfreemen; for which Reason they are always allowed to prove the Offence by the Oath of the Offender or Witnesses.

And indeed in the present Case, tho' a Penalty was libelled in the Complaint, and which, with great Submission, was competent; yet there is none decerned for by the Lord *Minto* Ordinary, who has only found Expence due: And it would seem certain, that, since the Petitioners acknowledged the Offence, the least Thing that could be done was to indemnify the Respondents as to the Expence they have been put to in the Complaint against the same, and the Petitioners ought quietly to have

have submitted to such favourable Sentence. Which leads to the fourth and last Particular urged by them, *viz.* their Objections to the Account of Expences ; as to which they likewise offered a Representation to the Lord Ordinary, who refused the same, and 'tis hoped your Lordships will do so likewise.

This Account amounts only to 8 *L.* 14 *sh.* 3 *d.* and was all truly laid out in the Prosecution, as their Box-master was and is willing to depone ; so that there was no Place for a Modification.

The first Objection is to the Articles laid out before the Dean of Gild Court ; these are all common Dues, and behoved to be expended, or otherwise the Complaint would not have proceeded : For Example, there are two Fiscals, and each of them got a Crown, and Half a Crown betwixt their Servants, being Twelve Shillings and Sixpence ; and they were the only Procurators in the Cause, and got only the ordinary Fees.

As to the Incompetency of the Dean of Gild Court, which is urged on this Head, it is affirmed by the Petitioners as a Thing certain ; whereas, by immemorial Usage, the contrary holds : The Dean of Gild Court give out constantly Jedges and Warrants in relation to Buildings in the *Canongate* ; and by an Act of the Town-council of *Edinburgh*, as Superiors thereof, the Jurisdiction of the Dean of Gild Court is extended over the *Canongate*. But the Respondents have little Occasion at present to labour that Point, or to anticipate your Lordships Judgment thereon, it being a Subject of Declarator presently depending.

For *Gilbert Blair* one of the Petitioners lives within the Liberty of the City, *viz.* *St. Mary's Wynd*, and therefore could make no Objection to the Jurisdiction of the Dean of Gild Court : And *John Wilson* the other was actually cited within the City, as appears from a Declaration by the Dean of Gild Officer produced, and could be proven by Witnesses if necessary ; and the *locus delicti* founds the Jurisdiction.

And further, the Defenders were ordained by the Court to find Caution to appear and give in their Answers against the

then next Court-day ; and accordingly *John Wilson* did find Caution for that Purpose, which prorogated the Jurisdiction, were it otherwise incompetent.

'Tis true, this Ordinance is complained of as an Act of Injustice ; but as it was conform to the Rules of Court, so, if he had thought it wrong, he ought not to have complied with it, but thereon raised his Advocation ; and his freely obtempering the Act, excludes him from all Objection thereto, or to the Jurisdiction.

Objection is made in the next place to the Expences relating to the Bill of Advocation. These in whole are only 1 L. 18 *sh.* including one single Consultation to a Lawier at a Guinea ; and the Petitioners are in the wrong to suggest, that there are two on that Head.

It is a Novelty to obtrude a Pursuer's advocating of Consent, as a Confession that there are just Grounds for the Advocation : The Motive for such Conduct in the present Case is obvious ; *namely*, That thereby the Sentence proceeding from your Lordships would have the more Authority, and prevent new Expence of discussing a Suspension, which the Petitioners would probably have raised, since they appear not a little litigious.

This Society consists of above Seventy Members, and have a great many poor Members, Widows and Orphans, and are at the Expence of maintaining two Orphan-girls in the Trades Maiden-hospital by your Lordships foresaid Decreet ; and, if Incroachments upon their Business by Unfreemen are not restrained, they will be very great Sufferers, and the Corporation at last may be thereby utterly ruined.

Upon the whole, 'Tis hoped, that, as your Lordships have established the Privileges of the Society of Barbers of *Edinburgh*, so you will maintain the same by your Justice against all Incroachments ; and therefore refuse this Bill, and add the further Expence occasioned by answering the same.

In respect whereof, &c.

AND. M'DOUALL.